Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Accelerating Wireless Broadband Deployment by	)	WT Docket No. 17-79
Removing Barriers to Infrastructure Investment	)	

To: The Commission

Comments of PTA-FLA, Inc.

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Summary

PTA-FLA, Inc. urges the Commission to take several decisive steps to curb remediate what has become a serious obstacle in the path to 5G and rural wireless build-outs:

1. Limit the definition of what constitutes a "federal undertaking" in the context of facility construction to facilities that are either expressly approved by the Commission on a site-specific basis prior to licensing as contemplated by the D.C. Circuit and the National Historic Preservation Act, or are subject to an environmental assessment conducted in connection with major environmental actions. This action would eliminate historical reviews for a large percentage of current construction activities and significantly reduce the burden on the Commission to review sites unnecessarily.
2. Where sites do fall within the definition of a federal undertaking, the Commission, in conjunction with the Advisory Council on Historic Preservation and the national Conference of SHPOs could exempt from historic review additional categories of construction that are would rarely if ever require review for direct effects.
3. Require tribes to define with specificity and by reference to objectively verifiable historical records where the tribes were so as to substantiate their interest in a particular region or site.
4. Prohibit the charging of fees by tribes to review proposed projects unless evidence of potential tribal impact is present, the tribes negotiate an arms-length fee with the proponent of the site, and the proponent is allowed to rely on other qualified experts in the absence of agreement with the tribe.

5. Authorize a voluntary fund into which tower constructors would contribute to ensure that in the event tribal remains are discovered in the course of construction, work would be halted, tribes would be notified, and the remains would be properly dealt with.
6. Local permitting authorities should be deemed not to have acted in a reasonable time under Section 332(c) if they fail to act on a permit within a 60 day time period. The Commission may then act itself by a deemed granted mechanism to authorize the construction, subject to an objection that the permit application was somehow not grantable. The Commission should also declare that fees in excess of $20 per page of the permit application are presumptively unreasonable.
7. The Commission should provide guidelines on the degree to which local authorities may impose conditions on tower construction that are not tailored to unmanned operations and do not weigh the benefit of cosmetic requirements against the cost and utility of such requirements. Imposition of conditions that serve no valid purpose should be deemed to have the effect of prohibiting the provision of service and be banned on those grounds.

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Comments of PTA-FLA, Inc.

PTA-FLA, Inc. ("PTA"), by its attorneys, hereby offers these comments in connection with the above-referenced Docket. As a long-time constructor of communications towers across the United States, and also as a wireless telecommunications carrier in its own right, PTA has been seriously adversely affected by the issues confronted by the Commission in this proceeding: unreasonably high application review "fees" being charged by Indian tribes and local authorities, delays in processing site permit applications, unnecessary, costly and inappropriate "aesthetic" conditions imposed on tower construction, costly and time-consuming reviews of potential Indian burial sites that have long ago been disturbed and will experience no additional disturbance by new construction at the same site, imposition of onerous conditions suitable to manned and operated structures rather than unmanned communication sites, and grossly overprotective set back ordinances that purport to protect the public from falling cell towers. These abuses worsen sharply with each passing year as the site permitting and site review processes have come to be viewed as an easy revenue opportunity for tribes and cities with no economic, political or legal check on the amounts that can be charged or the conditions that can be imposed.

About 18 months ago one of PTA's affiliates found itself facing demands for review fees by ten different tribes for a single site, with the fees ranging from $400 to $1,000. PTA's affiliate's representatives offered to pay the tribes up to $200 for their reviews -- an amount that had been generally acceptable in the past and was still acceptable to many tribes – but they took the position that they were free to charge whatever they wanted and the amounts were not subject to negotiation or review by the FCC. Repeated pleas to the FCC staff for intervention were utterly unavailing until the fees just had to be paid in order to get the sites constructed before winter weather made construction impossible. As predicted by PTA a year ago, the number of tribes demanding payment and the amount of the payments have increased exponentially. One tribe now demands $1,500 to undertake a review, and some sites have as many as 20 or 30 different tribes expressing an "interest" in the proposed construction, thus justifying the payment of a review fee. The Commission has effectively granted Indian tribes absolute gating power over the construction of any communications towers over vast swathes of the United States based simply on their unsupported expressions of interest.

This situation was unsustainable and could not continue without causing serious disruption of the critically important work of constructing towers. In early 2016, PTA was most concerned with erecting rural macro towers which are desperately needed if broadband service is to be provided to currently unserved parts of rural America. The problem has become even more intense, however, as the prospect of building hundreds of thousands of new microcells as part of the 5G roll-out becomes real. PTA therefore filed a Petition for Declaratory Ruling on May 3, 2016 seeking expeditious Commission rulings that would both significantly reduce the scope of tower constructions that are covered by the historic review process and reduce or eliminate the fees paid to tribes for their engagement in that process. PTA is gratified that the Commission has

finally included the substance of PTA's proposal in the NPRM as part of a broader look at the unnecessary impediments to the process of getting sites constructed.

I. Most Tower Construction is Not a "Federal Undertaking"

This nation faces the prospect of hundreds of thousands of planned tower sites, both macro and micro, having to go through lengthy and expensive environmental and historic preservation reviews solely because the Commission's current interpretation of "federal undertaking" is extraordinarily expansive. The sheer volume of communications sites subject to the procedures required by the National Historic Preservation Act (NHPA) could, however, be severely reduced by simply adopting a narrower, more realistic interpretation of what constitutes a federal undertaking. Such an interpretation would not only make common sense, but would also be consistent with how the D.C. Circuit interpreted that term and, almost certainly, with how Congress intended that term to be applied. In addition, as the Commission correctly noted, the provisions of the National Environmental Protection Act (NEPA) are governed by a similar threshold criterion: is the proposed action a "major environmental action[ ] significantly affecting the quality of the human environment." *NPRM* at Para. 25. It behooves us, then, to take a hard look at what should be considered a federal "undertaking" which would trigger Section 106 review under the NHPA.

The definition of federal undertaking in the NHPA includes projects, activities and programs that require a Federal "permit, license or approval." The gist of the language is that the "approval" that is contemplated is of a sort similar to the granting of a permit or license, not some broad authorization to do something anytime and anywhere. Certainly nothing in the Act suggests that the definition was intended to encompass the construction of all structures in which radio waves may be emanated. Yet the FCC has taken the concept of "federal approval" to its

farthest extreme, declaring in its 2014 *Report and Order*[1] in Docket 13-328 that its authority to regulate and require preconstruction approval extends to any facility which includes an "apparatus for the transmission of energy, or communications, or signals by radio." *R & O* at paragraph 84. This erroneously conflates approval to operate a radio device with authority to construct a structure in which a radio device is operated. Under the Commission's view, the erection of every structure in which a can of bug poison is sprayed would be a federal undertaking because the Dept. of Agriculture has approved the spray for residential use. This cannot be right.

Yet the FCC now considers its preconstruction "approval" authority to extend to any structure where a remote garage door opener, microwave oven, Wi-Fi router, or cellphone is to be used. The construction of such a structure is therefore a "federal undertaking" potentially requiring NHPA compliance. Technically, of course, Section 301 of the Communications Act requires *all* radio transmissions to be performed under the authority of an FCC-issued license, but the FCC abandoned that position when unlicensed radio transmissions started being authorized and are now ubiquitous. To be sure, the FCC has entered into a Nationwide Programmatic Agreement (NPA) which exempts from the historic review process structures involving the installation or use of unintentional radiators, mobile devices or unlicensed radiators operating under the authority of Part 15. But because operation of those radio emitters have been "approved" by the FCC, there is no reason why they could not someday fall within section 106's universal purview. Clearly, Congress did not envision that the construction of every structure in the United States (including all residential and commercial buildings) in which any kind of radio

[1] 29 FCC Rcd 12865, 12904 (2014

transmission will emanate would constitute a "federal undertaking" which would invoke the full panoply of Section 106 review.

While the FCC believes that the D.C. Circuit has affirmed its theory that all construction in the United States where radio waves maybe emitted constitutes a federal undertaking, *id.*, this is not at all true. In fact, the Circuit Court expressly limited the scope of the FCC's "approvals" as they apply to federal undertakings. This was the key issue in *CTIA-The Wireless Association v. FCC*, 466 F.3d 105 (D.C. Cir. 2006) (hereafter, "*CTIA*") when the wireless industry challenged the Commission's application of the rule to sites that were constructed under the non-site-specific geographic licenses typical of cellular systems: is there a "federal undertaking" when no federal agency reviews or approves the particular construction at issue? In looking at the scope of the Commission's rules implementing the National Programmatic Agreement, the Court somewhat grudgingly accepted the Commission's argument that *where a tower registration is required*, there is a federal approval. *CTIA* at pp 113-114. In a footnote, however, the Court emphasized that a federal undertaking is present *only* when tower registration is actually required. *Id.* at footnote 4. The Commission had tried to suggest that an undertaking occurs "at least" where a registration is required, but the Court pointedly re-stated that to apply "only" where registration was required. The Commission has simply ignored that critical footnote.

The FCC also proffered a second basis for finding a federal undertaking: the "limited approval authority" retained when an environmental assessment must be submitted in connection with a construction activity. *CTIA* at 114. The Court found that FCC review and approval of environmental assessments is indeed a federal undertaking. But environmental assessments are, of course, undertaken in only a very small handful of situations. Construction firms outside the purview of the FCC are able to determine every day that their proposed activities do or do not

constitute a major environmental action without going through the onerous and expensive process of paying Indian tribes to assist them. There is no reason why the normal methods which appear to work perfectly well for assessing all other construction activity in the United States cannot work for telecom-related construction.

In any case, it is clear that the *CTIA* Court was basing its approval of the Commission's Section 106 process on the assumption that the "vast majority of towers" are not covered by tower registrations or environmental assessments, do not involve federal undertakings, and therefore are not encompassed by the NPA. *CTIA* at footnote 4. Given the Court's clear view that a Section 106 obligation is *not* triggered under the NPA by a licensee who constructs a site pursuant to non-site specific license that does not require any specific federal approval, we must assume that the Commission's NHPA writ runs only to situations where a licensee or applicant is seeking a site specific authorization or where tower registration is required. Frankly, even tower "registration" should not be deemed to be an "approval" since in most cases there is no FCC action required on the registration at all other than the assignment of a number. The tower proponent is simply giving the FCC the particulars of its proposed structure. *A fortiori*, where a site is being constructed by an entity that is not even a license holder or applicant and where no tower registration or environmental assessment under Section 1.1308 of the rules is required, it is impossible to find a federal undertaking that triggers 106 obligations.

The Court's position is confirmed by reference to the terms of Section 106 itself. The statute requires a Federal "independent agency having authority to license any undertaking" to take into account the effects of the undertaking on historical sites "prior to the issuance of any license." 16 U.S.C. Section 470f. (emph., added) Congress could not possibly have intended Section 106 to apply to geographically defined, non-site specific licenses because the

Commission cannot even know where the proposed sites are until long *after* the licenses have been granted. Because the Section 106 process must be tied to a licensing activity that occurs prior to, and thus specific to, a given construction project, the mere fact that a site is constructed or used under the authority of a geographic area license does not, and could not constitute the federal "approval" which Section 106 envisions. Rather, the Court's narrower view of what constitutes a federal approval – one which is related to a specific site – is the only view that makes sense under the "prior approval" language of the statute.

The Commission should therefore revisit its current conception of what constitutes a federal undertaking and limit the span of that term to sites that are actually expressly authorized by the Commission whether by site-specific construction permit or environmental evaluation. This perfectly defensible interpretation of the statute would eliminate a large percentage of the construction reviews (including for micro and small cell installations) that are currently required solely because of the federal undertaking aspect. Not only would the industry and the American people benefit by less costly and quicker network expansion, but the Commission would be able to reduce the deployment of its personnel resources on these siting issues. Instead, the currently overburdened Historic Preservation staff could focus on protecting those sites that are truly of significance to Indians and to other historic preservation advocates.

II. Most Constructions Can Be Exempted from Section 106 Review

PTA's experience has been that virtually no site reviews predicated upon Indian concerns actually result in the discovery of any remains or other artifacts of historical significance. The result is that a vast amount of money and time are being devoted to activity that has no social utility whatsoever. This is precisely the kind of wasteful and unnecessary regulation that the FCC's current administration has vowed to root out. Just as the Commission and the other

signatories to the NPA and Collocation Programmatic Agreement have been able to categorically exempt unlicensed devices, mobile phones, and small collocated installations from Section 106 review, they could easily expand that list of exempt sites to more fully and accurately eliminate sites that are extremely unlikely to create a historical issue. These would include:

- Sites that have already been disturbed or covered over by actions that are not governed by the historic review process. Often a parking lot, farm or construction site is chosen as a tower site, and since no one was previously required to consider historic consequences, the commercial activity on the site has long ago caused whatever damage might be possible from construction activity at that site. Yet the current rules robotically mandate a historical review to belatedly confirm that no Indian remains will be disturbed.
- Sites where an existing tower is being replaced but at a greater height than the one it is replacing. Since the ground under the tower has already been disturbed, no additional disturbance would be caused by erecting a larger tower on the same spot. (This exemption, of course, would not apply to concerns about the visual effects of the taller construction on nearby areas, but these effects typically involve historic structures or parks rather than Indian remains.)
- Sites that have already been reviewed or inspected by one Indian tribe. As noted above, in many cases now ten or twenty Indian tribes may express an interest in a particular site. While no one tribe can speak for another, if one tribe inspects a site and determines that there are no Indian artifacts or remains that are of concern, there is no reason for twenty other tribes to visit the site to reach he same conclusion. The tribes should be encouraged to coordinate through a central information source

controlled by them that eliminates duplicative efforts. Obviously if any Indian remains are discovered which do not belong to the discovering tribe (something that virtually never happens), then the other potentially interested tribes would be advised through the same central source. In no case should tribes be allowed to demand payments or inspection fees based solely on an expressions of "interest" without a demonstration of some factual basis to believe that remains might be present there.

- Structures that have already been constructed, including twilight towers. No purpose whatsoever is served by requiring a historical review prior to the addition of a communications facility to a structure when the construction has already been completed. Yet the current rules compel the utterly useless process of somehow ensuring that no disturbance of Indian remains did not long ago occur.
- Sites built on solid rock or which will not disturb the soil. There can be nothing beneath the surface to disturb if the ground is solid or the entire construction will be above ground.
- Sites within the confines of planned communities which are part of existing developments. Any objects of historical or tribal significance would have already been encountered.
- Sites that have previously been developed for other uses in the past and are therefore unlikely to have any undisturbed remains present. Again, once a site has been disturbed by construction or other uses, no purpose is served by post hoc reviews.
- Sites within 25 miles of an existing reservation. Only the tribe on the nearby reservation is most likely to be affected by a particular project would have to be

notified. It would be obligated to alert other tribes if remains not associated with itself are discovered.

All of these categorical exemptions should be subject to the usual proviso that sites that have already elicited opposition or have had historic concerns raised would not fall within the exemption until the issue is resolved.

These exemptions would ordinarily require agreement by the signatories to the NPA since they effectively reduce the scope of what would otherwise by a federal undertaking (as that term will hopefully be limited as described above. This process can be cumbersome and time-consuming. Nevertheless, the Commission should initiate that process as soon as possible so that the construction projects which must commence in the next twelve months are not unduly and unnecessarily delayed.

III. Limit Tribal Expressions of Interest to Objectively Verifiable Areas

The Commission noted that the number of tribes which now routinely express "interest" in a given area has risen sharply in the last couple of years. This rise in interest, as PTA has demonstrated, is proportional to the fees the tribes can exact for reviewing proposed construction in those areas. Because an "expression of interest" effectively gives a tribe (under current procedures) an absolute veto over the construction of any communications tower in that area until it has been paid a fee, there clearly needs to be a more objectively verifiable check on where these areas of interest are. A number of tribes claim entire states as their territories, apparently on the grounds that they may have passed through there or hunted there some time in the last few centuries. This unbounded broad brush approach to identifying areas of interest is what results in thousands upon thousands of sites having to be reviewed that turn out to have no historical or tribal significance whatsoever.

The backwardness of the current process could be likened to a SHPO indicating that there is a historic site somewhere in the District of Columbia that needs to be protected, but the SHPO will only tell you (for a fee) where the historic site is *not* located. The infinitely more efficient and rational approach is to do exactly what the historic community now actually does: publicly identify where historic properties *are*, thus permitting constructors to either avoid them altogether or know what they have to deal with at the outset. A similar approach should be taken to protect tribal sites. By having everyone work from the same maps, potential impacts on tribal areas of concern could be significantly reduced, also reducing the need for totally unnecessary reviews. The areas designated as potentially significant would have to be precisely defined to encompass only their areas of greatest concern. Over-designation simply wastes everyone's time and money.

Under this approach each tribe would be required to delineate on a map precisely where it believes its remains are located and articulate why it thinks that. Simply having passed through a state or having hunted in a state should not be enough to give a tribe gating rights over that state or any significant portion of it. There are, after all, numerous maps and other reference sources that document and define the various tribes' historical areas of habitation. Then, as a further reality check, if a certain number (say 10) of sites in areas claimed by a tribe are found to have no Indian burial grounds, that geographic area could be removed from the areas recognized as being "of interest" to that tribe.

Alternatively, because the tribes themselves must know where the burial grounds are, they could self-declare a need to review any particular site, but if no artifacts are found there, the tribe would receive no fee. If the tribe's review was not completed within 20 days of first notification, the tribe's review right would be deemed waived. This policy would ensure that

tribes would be judicious in their designation of which burial grounds require review because the burden of useless and wasteful reviews would shift to them rather than on the tower constructors.

IV. Review Fees Should be Eliminated Entirely Except by Agreement with Constructors

As PTA has previously outlined and as the Commission has confirmed, the fees assessed by tribes to review proposed construction have increased as much as 1000% over what they were only a few years ago. The Guidelines issued by the ACHP expressly provide that no tribe is entitled to a fee for its review of a proposed project. Federal courts have similarly opined that tribes have a right to be consulted on proposed construction projects, but they do not have a right to be paid for reviewing the project. See, for example, *Narragansett Indian Tribe v. Warwick Sewer Authority*, 334 F.3d 161 (1st Cir. 2003). This is consistent with the Commission's otherwise universal policy that persons or entities that have or may have a problem with an application bear the burden of demonstrating to the Commission at their own expense that a problem exists. This is also consistent with the invariable policy of local land use authorities who may require notice to the local community that a particular construction is proposed, but never require the proponent of the construction to pay a fee to potentially interested people so they can determine whether or not they want to oppose the project. The Commission's current approach is a formula for obstructionism that, for good reason, has never been the way that federal or local permitting has worked. The practice of requiring fees to be paid to tribes runs directly counter to the longstanding American system of jurisprudence in which litigants bear their own expenses. The Commission must therefore act decisively to end this practice which has become an ugly parasite upon the historical review process.

The measures which we have already outlined above should serve to significantly reduce the number of proposed sites that are subject to tribal reviews. In the remaining cases where tribes would have a legitimate interest in the site, they should be entitled to no fee whatsoever for their initial review. If they have cause to believe that the site may be of historic significance to them, they would be required to articulate the basis for that concern. In that case, they could be, but would not be required to be, retained as consultants by the constructor. In that capacity they might be in a position to advise on how and why the site deserves to be protected from construction for a fee negotiated with and agreed to by the constructor. No other fees should be paid to the tribes at all. It is PTA's belief that it is the payment of fees that has distorted what was originally a simple and natural form of informal consultation on matters of potential significance to tribes into a revenue-generating mechanism that too often casts tower constructors and tribes as adversaries rather than as partners in the goal of preserving and protecting historical sites. In this connection it is worth noting that no other federal agency to our knowledge invests the tribes with such absolute gating power as the FCC does, and that has, naturally, resulted in far fewer tribes demanding consultation fees for the other agencies' federal undertakings.

If the Commission decides that there are circumstances in which tribes can demand payment for their services, the ACHP guidelines plainly limit that right to circumstances where the tribes are asked to consult on the particular site. This situation might arise if there is reason to believe that a tribe's burial grounds or other interests may be impacted by a construction. In many cases, an archeologist retained by the site proponent may have conducted a thorough shovel test of a particular site to verify the absence of tribal remains. In those cases, there is no obligation in the first instance to retain the tribe. Conversely, if the preliminary assessment of a

site offers evidence of artifacts or remains of tribal significance, it would be perfectly appropriate for the site proponent to negotiate an appropriate fee for the tribe to provide its expertise. In no case should a tribe be permitted to demand a fee simply for reviewing a proposed construction to see if they have an interest in it.

We should also note in this regard that the FCC is not a convenient or efficient forum for adjudging the reasonableness of tribal fees. In our experience, the staff's fee investigations take quite a bit of time, are often mooted by the passage of time because the proponent cannot wait any more months for a Commission resolution, usually result in no corrective action whatsoever, and are not subject to review by either the full Commission or the courts. In many instances the Commission insists on handling communications with the tribes itself on a sovereign to sovereign basis, a practice which invariably results in entrenchment of tribal demands. The situation is the height of arbitrariness and is highly tilted in the direction of preserving tribal receipt of the highest possible fees.

As a model for resolving contested matters, the current tribal fee dispute mechanism should be abandoned immediately. The optimal method for determining the reasonableness of fees would be a negotiation between the site proponent and the tribe. Such a negotiation can only work if the tribe is not allowed, as it currently is, to demand any fee it desires and the proponent has no recourse but to pay it. As a safety valve, therefore, a proponent should be permitted to retain its own Indian expert to assess the site in the absence of an agreement with the tribe. This alternative would serve as an effective check on the power of tribes to make unreasonable and unchallengeable demands and would incent them to be reasonable in their proposed fees.

PTA emphasizes that the measures proposed above are not intended to divest tribes of the right to express concern about actual federal undertakings that may affect them. This was, after all, the intent of the NHPA, and PTA does not oppose the tribes' right to weigh in on such matters, just as any other citizen can weigh in on a proposed action that might have an adverse effect on him. Indians would not be excluded from the process in any way but would be as free as ever to participate and express their views. They just would not be paid to do so. And the TCNS process ensures that they will have a full opportunity to express any concerns that they may have.

V. Guarding Against Inadvertent Disturbance of Indian Burial Grounds

The NPA and ACHP recognize that there can be situations where despite all the notices and preliminary shovel tests which are done on a particular site, there may be instances where Indian remains are discovered. In PTA's long years of experience, this has never occurred and, indeed, no burial grounds have ever been identified by any tribe in connection with any of its proposed sites despite thousands of notifications in response to expression of interest by scores of tribes. This experience, which we believe is common to most tower constructors, is part of what suggests so strongly that the expensive and time-consuming practice of checking virtually every proposed site for Indian artifacts is both wasteful and not an economically justifiable means of accomplishing its intended purpose. The Commission should have its new team of economists take a look at this to opine on whether the current regulatory system with its heavy burdens in time and money makes any economic sense given the miniscule benefits in terms of historic preservation that are yielded. Preserving the current scheme runs directly counter to the pledges of Chairman Pai and Commissioner O'Rielly to alleviate the burdens of unnecessary regulation, not prolong them.

One out-of-the-box approach that might satisfy the concerns of all concerned at much less cost than the current system is to establish an industry fund that tower erectors could contribute to. The fund would permit contributors at a relatively low cost to handle the unexpected discovery of Indian remains (or other historic artifacts) during the course of construction. In the very rare instances when Indian remains on sites they are excavating are discovered, the existence of a substantial compensation fund would incentivize the tower erector to do what the rules currently require: stop work immediately and alert the appropriate concerned parties, including Indian tribes. The tower constructor would then quickly be made whole by recovering its sunk costs in the site, and pertinent tribes would receive a payment to assess the site and assure that the remains that were found are treated with full respect and restored to, or left in, their original condition. Because this would occur in less than one in a thousand cases, participating tower companies would be happy to participate in such a program. PTA is willing to make the first contribution toward this project. Such a program would give comfort to both tribes and tower erectors that they can go forward with the vast majority of their projects with little likelihood of ever disturbing a sensitive Indian site, but that if they do, the site will be properly treated, respected, and restored. Tower erectors who choose not to participate in the fund could continue to endure the current process.

VI. Fees and Delays Attributable to Cities and Counties

While this Comment has focused primarily on the problem posed by tribal fees, the Commission has correctly noted that cities and counties have become sources of delay and expense as well. Unlike tribes, whose connections with particular sites are often marginal and based on some ancient connection, local authorities ae vested with full authority to regulate land use within their borders, subject to constraints imposed by various federal statutes, including the

Communications Act. PTA applauds the Commission's recognition of the problems that have been identified with the local permitting process that are impeding the ability of the country to undertake the build-out necessary to implement 5G service.

The Commission has floated several useful and creative mechanisms for expediting local permit procedures within the constraints of the statute. It is important that the Commission adopt a mechanism that passes judicial muster since any such rule may meet with challenge from local authorities and their representatives. PTA believes the best avenue to assert federal jurisdiction over the permitting process is the "Lapse of State and Local Government Authority" concept set forth at Para. 14 of the NPRM. Congress explicitly carved out an exception to state and local authority over the permitting process when those authorities fail to act on permitting requests within a reasonable time. When that situation obtains, therefore, the FCC may assume the authority to act on the request by whatever means it adjudges appropriate, including by a "deemed granted" rule. The Commission may also make the determination of what is a reasonable time for the local authorities to act, and here the sixty day period proposed by the Commission is more than reasonable. This interpretation of the statutory language duly preserves the authority of the local governments to handle permitting in the first instance, as contemplated by the statute, but also allows for federal relief when the local authorities are not in compliance with an express requirement of Section 332(c), namely the obligation to act in a reasonable time, again as contemplated by the statute.

We note that one problem with the "deemed granted" approach is that the Commission would not itself have had the opportunity to review the permit request to ascertain whether there is some problem with the proposal that would warrant denial of the permit on its merits. Presumably there are some permit applications that, for example, fail to comply with local

zoning ordinances or it might be unclear whether the ordinances are complied with. The deemed granted tool is a blunt one that might end up granting applications that, if actually reviewed, should be denied. The Commission should therefore retain the right to review on its own motion or at the behest of the local authority whose jurisdiction has been preempted whether the permit should be granted. This safety valve will ensure that defective proposals will not be granted by default.

PTA does not believe that the Commission should rely on the authority of Section 253 of the Act to preempt local authority. The object here is to ensure that permits are acted on in a reasonable time. For a delay in action to amount to a "prohibition of service" would, in our view require a delay of more than sixty days and possibly even as much as six months. The approach discussed above is a more solid basis for federal action.

Finally, the Commission's authority to discipline the fees charged by local regulators is less clear under the Act than its authority to ensure prompt action. The record of Docket 16-421, and in particular the Comments of NTCH, Inc., reflect numerous examples of excessive fees being charged by local authorities for a review process that sometimes takes only a matter of minutes.[2] PTA requests that the Commission include in the record of this proceeding the comments and data filed in Docket 16-421 since those will bear upon the issues to be decided here. As a metric for reasonableness of permitting fees, the Commission should declare that a fee for a communications facility permit should not exceed $20 per page of the permit application on the theory that the time and effort involved in reviewing such an application is related to the volume in pages of the application. While the Commission's authority to enforce

[2] See Comments of NTCH, Inc. filed March 8, 2017.

such a determination is unclear, the mere establishment of a federal benchmark should serve to limit excesses at the local level, and in egregious cases could support a claim that the local authority's fees are actually having the effect of prohibiting the provision of service. In addition the FCC should endeavor to set up its own discussion with local authorities and set forth its own model rules for telecommunication siting that are not influenced by the tower companies.

VII. Unreasonable Conditions Imposed on Tower Construction

While unnecessary cost and delay are the most serious factors impeding the tower permitting process, we cannot close without pointing to the increasingly problematic practice of local authorities imposing gratuitous, unneeded and sometimes silly conditions on tower construction projects. In the latter category is the example cited by NTCH in its Docket 16-421 submission: a county government first required a tower to be disguised as a tree, then required the tree to be painted orange and white to comply with FCC rules. Obviously the structure would no longer be disguised as a tree once it was painted orange and white, but the locality insisted on this absurd and costly requirement. Cosmetic treatments do have a place in the permitting process, but they should be applied rarely and only after careful consideration of both the circumstances of the cosmetic treatment and the cost incurred by an effort that would have only marginal utility. They should not be permitted to be imposed routinely.

Just as importantly, local authorities impose construction conditions that have no rational benefit in the context of a tower construction. They often, for example, require towers to be situated at least two and sometimes even three tower lengths from the boundary of the property on which they stand. The intent is purportedly to protect against towers falling on adjacent properties, but it is of course impossible that a tower would fall any farther than the length of its tower height. Any greater protection zone is simply a matter of discouraging or preventing the

construction of a tower where the local authority would prefer not to have a tower but cannot say so directly. In a similar category are requirements that might be appropriate for a building that was designed for human habitation but have no place in a structure that is intended exclusively for unmanned operation. For example, one local authority has required the construction of a driveway designed to permit a firetruck to circle around the tower. This adds considerable original expense and long term maintenance expense for the driveway despite the fact that a firetruck would never have to circle around the unmanned structure. This and other road construction requirements simply add cost to the site development but do nothing at all to enhance safety or provide any other needed utility.

As with permitting fees, the FCC should make it clear that blocking tower construction by artifices such as imposing unwarranted conditions on the project will be deemed to have "the effect of prohibiting the provision of personal wireless services" just as clearly as a flat denial of the permit and therefore will be barred by Section 332(c)(7)(B)(II).

Conclusion

PTA urges the Commission to adopt the measures recommended above to streamline, rationalize and expedite the non-federal approvals needed for the construction of communications towers.

Respectfully submitted,

PTA-FLA, Inc.

By: _____

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